



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Washington D.C. 20240



## DIRECTOR'S ORDER NO.: 225

### Subject: Incidental Take of Migratory Birds

**Sec. 1 What is the purpose of this Order?** The U.S. Fish and Wildlife Service (Service) interprets the Migratory Bird Treaty Act (MBTA) to prohibit incidental take of migratory birds and will enforce the statute accordingly. This Order provides background and guidance to Service employees, including expectations for conducting Service activities, providing technical assistance, and prioritization of our enforcement activities.

**Sec. 2 What is the legal authority for this Order?** The legal authority for this Order is the MBTA ([16 U.S.C. 703-712](#)).

### Sec. 3 What terms do you need to know to understand this Order?

- a. **Migratory bird** in [50 CFR 10.12](#) means “any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in 50 CFR 10.13, or which is a mutation or a hybrid of any such species, including any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof.” The list of protected birds is maintained in regulation at 50 CFR 10.13 and includes over 1,000 species. Migratory birds are protected based on whether their species, family, or taxonomic group is covered under at least one of the four bilateral migratory bird treaties. Birds are protected even if they do not migrate, no matter their origin, and whether or not they are raised in captivity (50 CFR 10.12).
- b. **Incidental take** means the taking or killing of migratory birds that results from, but is not the purpose of, an activity.<sup>1</sup> Our assessment of whether an activity violates the MBTA will take into account case law, including the case law applicable in particular jurisdictions.
- c. **Beneficial practice** means an action implemented in an effort to avoid and minimize the incidental take of migratory birds. We also refer to beneficial practices as best management practices, conservation measures, best practices, mitigation measures, etc.

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<sup>1</sup> Note that “take,” and thus incidental take, under the Endangered Species Act (ESA) differs in scope from “take” under the MBTA. Compare 16 U.S.C. 1532(19) and 50 CFR 17.3 with 16 U.S.C. 703(a) and 50 CFR 10.12.

#### **Sec. 4 What is the background for this Order?**

- a. A wide range of activities can result in the incidental take of migratory birds, including activities conducted by public- and private-sector entities and the general public. Most individuals and organizations have an interest in, and in the case of Federal entities, a responsibility for, protecting migratory birds.
- b. This Order confirms that the Service has reestablished its longstanding policy and practice of enforcing the MBTA pursuant to its interpretation of the Act as prohibiting the incidental take of birds federally protected on the List of Migratory Birds ([50 CFR 10.13](#)). With the **DATE** rulemaking (**## FR #####**), the Service revoked the interpretation codified by the January 7, 2021 rule (86 FR 1134), which had briefly established the opposite interpretation.
- c. With the revocation rule, the Service returns to the interpretation of the MBTA implemented for the previous several decades by the Service, the Department of the Interior, and the Department of Justice. This Order clarifies how we will prioritize program and law enforcement resources consistent with that interpretation upon the effective date of that rule, which is **DATE**.

#### **Sec. 5 What is the policy on enforcement of incidental take of migratory birds?**

The Service recognizes that a wide range of activities may result in incidental take of migratory birds. Pursuing enforcement for all these activities would not be an effective or judicious use of our law enforcement resources. For that reason, the Service will focus our enforcement efforts on specific types of activities that both foreseeably cause incidental take and where the proponent fails to implement known beneficial practices to avoid or minimize incidental take. Our intention through this policy is to apply a transparent and consistent approach to managing and prioritizing our enforcement of incidental take, taking into account the case law applicable in a given jurisdiction and the facts and circumstances of each case.

- a. The following types of conduct are not a priority for enforcement:
  - (1) A member of the general public conducting otherwise legal activities that incidentally take migratory birds;
  - (2) A Federal agency conducting activities in accordance with a signed memorandum of understanding with the Service developed under Executive Order 13186 for the conservation of migratory birds; or
  - (3) A public- or private-sector entity conducting activities in accordance with applicable beneficial practices for avoiding and minimizing incidental take.
- b. The Service prioritizes the following types of conduct for enforcement:
  - (1) Incidental take that is the result of an otherwise illegal activity; or
  - (2) Incidental take that:
    - (i) results from activities by a public- or private-sector entity that are otherwise legal;
    - (ii) is foreseeable; and

(iii) occurs where known general or activity-specific beneficial practices were not implemented.

- c. The Migratory Bird Program maintains a [comprehensive website of beneficial practices, conservation measures, and decision support tools](#).

**Sec. 6 What is the policy on Service activities that may result in incidental take of migratory birds?**

- a. Service personnel must review their activities to determine if incidental take is likely. Common actions that may result in incidental take of migratory birds include, but are not limited to, infrastructure construction, operation, and maintenance; vegetation clearing and management; controlled burns; and projects meant to eradicate invasive species.
- b. If an activity will foreseeably result in incidental take of migratory birds, Service personnel must develop and implement beneficial practices to avoid or minimize impacts to migratory birds.
- c. Service personnel should ensure their activities minimize negative effects to migratory bird habitats to promote the conservation of migratory bird populations.
- d. Service personnel may consult with the Regional Migratory Bird Program to review actions for potential effects to migratory birds and their habitats and provide technical assistance on beneficial practices intended to avoid or minimize those effects.

**Sec. 7 Where can Service employees find information on beneficial practices to reduce impacts to migratory birds?**

The Migratory Bird Program maintains a [comprehensive website of beneficial practices, conservation measures, and decision support tools](#). For further assistance, contact Migratory Bird Program representatives.

**Sec. 8 What is the status of other guidance relevant to this Order?**

- a. This Order revokes and replaces the Director's memorandum entitled "Guidance on the Recent M-Opinion Affecting the Migratory Bird Treaty Act," April 11, 2018.
- b. Solicitor Opinion M-37041, Incidental Take Prohibited Under the Migratory Bird Treaty Act (January 10, 2017), remains suspended and temporarily withdrawn as of February 6, 2017.
- c. Solicitor Opinion M-37050, The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (December 22, 2017), was permanently withdrawn on March 8, 2021.

**Sec. 9 When is this Order effective?** This Order goes into effect on **(INSERT DATE REVOCATION RULE IS EFFECTIVE)**. It remains in effect until we incorporate our

interpretation that the MBTA prohibits incidental take into the Code of Federal Regulations (CFR), incorporate it into the U.S. Fish and Wildlife Service Manual, or until we extend, amend, supersede, or revoke it, whichever comes first. If we do not take any of these actions, the provisions of this Order will terminate 18 months from the date it was signed.

**Sec. 10 Application.** This Order is intended only to improve the internal management of the U.S. Fish and Wildlife Service and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.